

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE WESTERN DISTRICT OF TEXAS

3 WACO DIVISION

4 DYFAN, LLC

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5 VS.

* CIVIL ACTION NO. W-19-CV-179

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6 TARGET CORPORATION

*

December 19, 2019

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8 BEFORE THE HONORABLE ALAN D ALBRIGHT, JUDGE PRESIDING
MARKMAN HEARING

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01:05 1 (December 19, 2019, 1:05 p.m.)

01:05 2 DEPUTY CLERK: Markman hearing in Civil Action
01:05 3 W-19-CV-179, styled Dyfan, LLC vs. Target Corporation.

01:05 4 THE COURT: If you all would be so kind as to introduce
01:05 5 yourself on the record and let me know who will be speaking
01:05 6 primarily for each side.

01:05 7 MR. DAHLGREN: You have Derek Dahlgren here from Devlin
01:05 8 Law Firm for Dyfan.

01:05 9 THE COURT: You need to stand up.

01:05 10 MR. DAHLGREN: Oh, sorry, sir. Derek Dahlgren from Devlin
01:05 11 Law Firm for plaintiff Dyfan, LLC.

01:05 12 THE COURT: Okay.

01:05 13 MR. GREENE: Good afternoon, Judge Albright. Bert Greene
01:05 14 from Duane Morris. Here with me, my colleagues, Matt Yungwirth
01:05 15 and Chris Tyson. Mr. Tyson is going to be presenting the
01:06 16 argument today.

01:06 17 THE COURT: Very good.

01:06 18 Have you all discussed which -- how you all want to do it
01:06 19 as in terms of going back and forth? Have y'all had any
01:06 20 discussions?

01:06 21 MR. GREENE: No specific discussions, Your Honor. I think
01:06 22 we probably do have a preference as to which term we might
01:06 23 start with, if the Court would indulge that. We're happy to do
01:06 24 it however the Court would prefer.

01:06 25 THE COURT: What claim term did you want to start with?

01:06 1 MR. GREENE: I'll leave that to Mr. Tyson.

01:06 2 MR. TYSON: Your Honor, we would believe that the group B
01:06 3 terms for the second code term would be the preference.

01:06 4 THE REPORTER: Counsel, I need you to turn that microphone
01:06 5 on.

01:06 6 MR. TYSON: Gotcha.

01:06 7 THE COURT: Okay. You said group B. We have -- I have
01:06 8 group 2 terms, terms 13, 14 and 15? Is that --

01:07 9 MR. TYSON: Yes, Your Honor. Those are the same. We can
01:07 10 call them group 2.

01:07 11 THE COURT: I'm happy to start with those.

01:07 12 MR. TYSON: All right. I'll proceed, Your Honor.

01:07 13 THE COURT: Okay.

01:07 14 MR. TYSON: May it please the Court. Good afternoon, Your
01:07 15 Honor.

01:07 16 THE COURT: Yes, sir.

01:07 17 MR. TYSON: Very honored to be here today.

01:07 18 THE COURT: Happy to have you.

01:07 19 MR. TYSON: There's been a -- number one, I would like to
01:07 20 start by thanking Mr. Yi and yourself for giving us some

01:07 21 guidance on the arguments that you really wish to hear today.

01:07 22 Obviously there were a lot of terms, and this really helped
01:07 23 streamline everything. So I appreciate your indulgence there.

01:07 24 THE COURT: You're more than welcome. You should
01:07 25 primarily thank Dr. Yi.

01:07 1 MR. TYSON: Dr. Yi. I will. Thank you.

01:07 2 There's been a lot of briefing in this case, so I think it
01:07 3 would just be useful, as we've done in at least our opening
01:07 4 brief, just to give a little bit of context in terms --

01:08 5 THE COURT: I think my court reporter is going to scream
01:08 6 at me if I don't tell you to slow down a little bit.

01:08 7 MR. TYSON: All right.

01:08 8 THE COURT: Okay.

01:08 9 MR. TYSON: Yes, Your Honor. So I'm just going to give a
01:08 10 little context for the argument as well. If we can go to Slide
01:08 11 2, please. And everyone can see the slides, I presume?

01:08 12 THE COURT: I can. Yes, sir.

01:08 13 MR. TYSON: All right. Thanks, Your Honor.

01:08 14 As we've discussed, there are -- the two patents at issue,
01:08 15 the '899 patent and '292 patent, arose from an application that
01:08 16 was filed initially in 2011 that is referenced here. This is
01:08 17 an excerpt from the related application section of the '899
01:08 18 patent and it references specifically the application serial
01:08 19 number 13/410,197, which we refer to as the '197 application in
01:08 20 our briefing, as well as the provisional application
01:09 21 61/517,584, which we refer to in our briefing as the '584
01:09 22 provisional. And specifically the patents expressly note that
01:09 23 they each -- each of those applications are incorporated by
01:09 24 reference in their entirety. And the reason that's important,
01:09 25 if we can go to Slide 3, is that there's been some discussion,

01:09 1 especially in the latest set of briefing, in the reply
01:09 2 briefing, as to what is a provisional application in terms of
01:09 3 the disclosure of a patent and specifically for claim
01:09 4 construction. And as we're identifying here, the Federal
01:09 5 Circuit -- and these are only three example decisions. Two of
01:09 6 these are provided directly in our opening brief -- identify
01:09 7 that priority applications like this provisional, the '584
01:09 8 provisional, are intrinsic evidence. They're part of the
01:09 9 record and should be used as intrinsic evidence for claim
01:09 10 construction purposes. There's actually a quote that I'll read
01:10 11 from --

01:10 12 THE COURT: I --

01:10 13 MR. TYSON: Don't need it? Got it. Got it, Your Honor.

01:10 14 So we can move on.

01:10 15 THE COURT: I not only got it, but I agree.

01:10 16 MR. TYSON: Thank you.

01:10 17 And I think it's actually really important in a case like
01:10 18 today where we're dealing with means plus function limitations.
01:10 19 And we've identified a separate case for that as well in our
01:10 20 opening brief.

01:10 21 If we can go to Slide 4. So setting the kind of context
01:10 22 was, in the provisional it really does detail the problem that
01:10 23 the patents were trying to solve. And the problem that the
01:10 24 patents were trying to solve dealt with using standard routing
01:10 25 protocols that were available in existing wireless

01:10 1 communication standards. So the one that is called out in
01:10 2 these excerpts is the internet protocol. It identifies a
01:10 3 number of issues with simply routing based on the internet
01:10 4 protocol, especially when you have mobile devices that change
01:10 5 locations fairly frequently.

01:10 6 And the statement really at the bottom of the excerpt
01:10 7 here, it is obvious that today's systems do not provide a
01:11 8 convenient method of directly sending data messages to a
01:11 9 certain physical location and do not support the efficient
01:11 10 collection of certain data messages from specified physical
01:11 11 locations. We identify that as really being a summary of the
01:11 12 over 12 pages of kind of the background that the patent gives
01:11 13 as the problem that it's trying to solve.

01:11 14 If we can go to the next slide, which is Slide 5. The
01:11 15 provisional application both in the summary and then in the
01:11 16 first paragraph of the detailed description gives a very
01:11 17 concise description of how it solves that problem. And it
01:11 18 specifically says, you know, the present invention describes a
01:11 19 relationship between these various entities within a network
01:11 20 and supports a novel approach to network data routing based on
01:11 21 location in various service attributes.

01:11 22 And, secondly, it says, the invention described herein --
01:12 23 here is the crux of the invention. The invention described
01:12 24 herein uses a location header to route messages to and from
01:12 25 mobile terminals via a variety of wireless and wireline

01:12 1 communication networks.

01:12 2 So it is this introduction of a modification to these
01:12 3 existing protocols which is what the provisional application
01:12 4 and the parent of the patents at issue here it's identifying as
01:12 5 the solution. It is using a location header instead of or in
01:12 6 lieu of an IP address. It's almost using a location address so
01:12 7 you can route to a specific location. You can receive data
01:12 8 from a specific location, but you're not tethered to this IP
01:12 9 address that we would otherwise use.

01:12 10 Now, we've also detailed sort of the history of these
01:12 11 applications as they proceeded through the Patent Office.

01:12 12 If we can go to Slide 6. You can see what the -- was
01:13 13 originally -- the filed application original -- Claim 1 in the
01:13 14 '197 application. So a year after the provisional was filed,
01:13 15 this was the claim that was filed with the '197 application.

01:13 16 And we've talked about the progression in our opening
01:13 17 brief of how this -- these applications sort of came to be, how
01:13 18 the claims came to be what they are. And there was a clear
01:13 19 diversion from the original invention at the time of this
01:13 20 amendment that I'm showing here in 2014. And as we detailed in
01:13 21 our briefing, this claim is actually claiming something that
01:13 22 was in the prior art, even in the admitted prior art, in the
01:13 23 background section of the patent. It is no longer tied to this
01:13 24 concept of location-based routing, and it is -- it is literally
01:13 25 just having a wireless component provide an identifier such

1 that the location of the mobile device is capable of being
2 identified and then just using the identifier of this wireless
3 component to perform some generic operation.

4 If we can go to Slide 7. In 2017 this slide is intended
5 to show that what happened in the '197 application eventually
6 is the claim got a little -- they added a little bit more meat
7 on the bones. But, in essence, that claim got appealed to the
8 Patent Trial and Appeal Board in May of 2019. And then it was
9 ultimately abandoned after a final decision by the Patent Trial
10 and Appeal Board. You can see the claim. I'm not going to
11 recite the claim, but notice the structure of the claim, and
12 that is as of 2017 when it was appealed, that same year is when
13 the application leading to the '899 patent is filed.

14 If we can go to Slide 8. So it's not possible to fit any
15 of these independent claims on a single slide, but we're doing
16 our best here. And, again, the appeal process for the '197
17 application is happening in 2017. The '899 patent is filed in
18 October of 2017. And there are 929 words in this claim
19 spanning almost two columns. And what was really added to the
20 claim that was originally at the Patent Trial and Appeal Board
21 were these at least 12 functional claim limitations. And those
22 span from really where it starts in that green section all the
23 way down to where the end of the yellow section happens. Those
24 are the 12 functional software-based applications, limitations
25 that were added, and that encompasses over 600 words.

01:15 1 We've only -- you know, out of abundance of streamlining
01:15 2 and the like, we've only identified five, and those are five
01:15 3 within this claim that we are disputing and identifying as
01:15 4 being -- that we believe are subject to 112-6 means plus
01:15 5 function limitation.

01:15 6 So essentially what was added to the PTAB invalidated
01:15 7 claims were these 12 functional limitations. And as we've
01:16 8 detailed in our briefing, I believe this to be a very unique
01:16 9 case. I've personally never seen claims of this length. The
01:16 10 '292 patent even has a claim, dependent Claim 4, that goes over
01:16 11 seven and a half columns long. It has over 100 different
01:16 12 alternative limitations that you can have.

01:16 13 So these are unique claims. This is a unique
01:16 14 specification. We've detailed this with so much qualifying
01:16 15 language that it really devoids any semblance of a specific
01:16 16 structure to any of this described functionality within that.
01:16 17 It was a unique prosecution strategy initially to sort of
01:16 18 divorce the claims in 2014 from the disclosures stated
01:16 19 invention, then introducing a column and a half, over 600 words
01:16 20 of functional software-based language.

01:16 21 And then it continues to be a unique case in that we have
01:16 22 a unique argument that an attorney can simply tell the Patent
01:17 23 Office that when it added these 627 words that are functional,
01:17 24 that it did not intend 112-6 to apply, and that when it did --
01:17 25 when the attorney does so, it magically -- those self-serving

01:17 1 statements, regardless of their impact on patentability, are
01:17 2 forever binding on Your Honor, all courts, Article 3 courts, on
01:17 3 the Patent Trial and Appeal Board and would prevent yourself
01:17 4 and other adjudicating bodies from ever examining the vast
01:17 5 majority of the claim language, like a column and a half of
01:17 6 this claim language.

01:17 7 Well, of course that's not the law. Otherwise, tomorrow
01:17 8 every patent attorney would do exactly what Dyfan's attorney
01:17 9 did in this case and just write down a statement to the Patent
01:17 10 Office and say, these claims, you know, are not subject to
01:17 11 112-6, and the claims that we're dealing with today would be
01:17 12 the norm rather than the extreme outlier.

01:18 13 And the critical point I think here is one I know Your
01:18 14 Honor understands very well, and that is it's the notice
01:18 15 function that's served by claims. And functional claiming is
01:18 16 permitted. Even a column and a half of functional claiming is
01:18 17 permitted. But that goes along with the requisite quid pro quo
01:18 18 associated with that. If you don't give the public the
01:18 19 structural metes and bounds of the claim, either in the claim
01:18 20 itself or in the disclosure, then the notice function fails,
01:18 21 and the public doesn't recognize what these -- what are the
01:18 22 metes and bounds of the claim. And that's a critical component
01:18 23 of all claims.

01:18 24 So if we can go to the next slide. What this slide is
01:18 25 really attempting to do is show what we did in our briefing --

01:18 1 this took a lot of effort and energy from the team -- was to
01:18 2 streamline for the Court what we see as the significant issues
01:18 3 raised by these, you know, over 12 functional limitations in a
01:18 4 single claim. And given the sheer length of the claim, it was
01:19 5 obviously a lot of work. The fact is we have over 50 asserted
01:19 6 claims against us, for Target, including seven independent that
01:19 7 look a lot like that '899 patent Claim 1. And the fact is that
01:19 8 over two thirds of these claims are functionally drafted.

01:19 9 And so what we've done is we focused our challenges on
01:19 10 just really a handful of these limitations. We attempted to
01:19 11 group them for Your Honor and Dr. Yi, among these 50 asserted
01:19 12 claims, and then we provided -- although we provided a number
01:19 13 of -- we provided expert testimony. We provided as much
01:19 14 evidence as we could within the intrinsic record. What we're
01:19 15 doing here is we're just merely illustrating the five
01:19 16 limitations that we're disputing from this particular claim.
01:19 17 They're software-based functional limitations.

01:19 18 Now, if there aren't any initial questions on any of the
01:19 19 background, I think I want to jump to just the first code term
01:20 20 that we talked about, which is group 2. And if we could go to
01:20 21 Slide 29. So here this is representative term 14, and to the
01:20 22 '292 patent it is Claim 15.

01:20 23 THE COURT: And you're on Slide 29.

01:20 24 MR. TYSON: I'm on Slide 29, I believe. Yeah.

01:20 25 Okay. And this is a -- again, it's a code configured to

01:20 1 execute by at least one of a plurality of mobile devices, and
01:20 2 the code when executed is configured to perform a function.
01:20 3 And we've identified -- in green we've identified what we
01:20 4 consider the immediate structure of this claim limitation. And
01:20 5 then in orange we've reflected what we believe to be the
01:20 6 function associated with this claim.

01:20 7 If we can go to Slide 30. So here there's -- we're not --
01:21 8 no one's disputing that rather than means for this claim --
01:21 9 claims code configured to be executed and when executed further
01:21 10 configured to perform a function. That's not in dispute. I
01:21 11 also don't believe that there is actually a dispute over the
01:21 12 fact that this particular function requires special programming
01:21 13 of a general purpose computer. And we've reflected how we've
01:21 14 drafted this term in our briefing as well as in Dr. Goldberg's
01:21 15 declarations, is that the function is to cause to be output via
01:21 16 the at least one mobile device, the second visual information
01:21 17 based on the second location relevant information.

01:21 18 And then there's three criteria. One is that caused to be
01:21 19 output is in response to the receipt from at the least one
01:21 20 server and via the second wireless communication protocol, the
01:21 21 second response message, including the second location relevant
01:22 22 information. So that's one criteria.

01:22 23 Another criteria, the cause to be output function or
01:22 24 action has to be performed after the first visual information
01:22 25 is caused to be output. It also the caused to be output has to

01:22 1 happen after the at least one mobile device is moved in the
01:22 2 building. And so this is clearly not a function that would
01:22 3 simply be performed by plugging in a computer that you buy at
01:22 4 Best Buy or somewhere else or by downloading some software.
01:22 5 This is a function that must be specially programmed in order
01:22 6 to be performing.

01:22 7 So we can go to the next slide. And the next series of
01:22 8 slides, what we tried to do here is associate a number of
01:22 9 different -- we basically identified what we -- what we
01:22 10 consider the patent owner, Dyfan here, arguing as far as
01:23 11 structure from the surrounding claim language.

01:23 12 I think what I'd like to do is, even before we get to that
01:23 13 term, would be to go back to Slide 11 and talk about what
01:23 14 Dyfan's strategy is really -- and what their arguments really
01:23 15 are for both of these terms, all the code terms. And
01:23 16 essentially what I believe Dyfan's arguments are, and
01:23 17 Mr. Dahlgren can correct me if I mischaracterize anything.
01:23 18 It's not intentional. The first is that code -- their first
01:23 19 argument is that code is not a nonce term and, therefore, by
01:23 20 itself is sufficiently definite structure regardless of the
01:23 21 function. And that would only be true if this was a general
01:23 22 purpose function. Because it's a special purpose function,
01:24 23 regardless of whether code is a nonce term or not a nonce term,
01:24 24 you must look at what -- the sufficient structure must be
01:24 25 looking at what the special purpose function is in determining

01:24 1 whether it is sufficient to perform that special purpose
01:24 2 function.

01:24 3 Their second argument is -- was essentially shown on that
01:24 4 last slide, Slide 30, was that code executing on the mobile
01:24 5 devices where that mobile device sends messages and receives
01:24 6 messages from either the broadcast communication unit or a
01:24 7 server and it sends those messages using first and second
01:24 8 wireless communication protocols, that that is the structure.
01:24 9 That structure recite is sufficiently definite for every single
01:24 10 functional limitation that's in dispute today. And that's in
01:24 11 the -- in any of the patents. So all of those 12 functional
01:24 12 limitations would have this same structure. That's all that's
01:24 13 needed according to the patent owner.

01:25 14 Now, Dyfan, notably, these are their two points that they
01:25 15 rest on. Nowhere in their briefing do they point to a single
01:25 16 disclosure in the specification of the patents, including the
01:25 17 incorporated by reference documents for any limitation.
01:25 18 They're not -- they're not looking at a particular
01:25 19 limitation -- a particular function and saying, okay. For this
01:25 20 function we need to look at the specification. We need to
01:25 21 identify anything. Everything -- all of their arguments are
01:25 22 the same, and they're all based on these two points. And I
01:25 23 think that's very telling, especially with the unique
01:25 24 circumstances, especially the unique claims we have here.

01:25 25 And if we can go to Slide 12. Again, this is a little bit

1 closer view of a portion of the '899 patent Claim 1. But for
2 all of these 25 disputed limitations, both system and code
3 limitations, including the three shown here, besides the claim
4 language, the only other source of structure that Dyfan is
5 pointing Your Honor to and the public is that during both Step
6 1 and Step 2 of the Williamson analysis are existing wireless
7 communication protocols at the time of the invention.

8 And that really begs a question. The threshold question
9 is what could possibly be inventive about these claims if the
10 PTAB, the Patent Trial and Appeal Board, invalidated the claim
11 of the '197 application and all of the structure of this column
12 and a half of functional claim language is in existing wireless
13 communication protocols? That can't really be the case.

14 And so I think what's even more telling is during Step 2
15 of the analysis Dyfan again doesn't point at all to the patent
16 disclosure. What Target did is we did our best. We looked
17 at -- for each disputed limitation we looked to find the
18 closest description we could possibly find in the disclosure of
19 the patents and the incorporated documents and we said, here's
20 what we think is the closest structure to these limitations.
21 But that structure was not sufficient. There were gaps.
22 There's a lot of things missing. You still don't get how you
23 would achieve those claimed functions from the disclosure, and
24 the reason for that was clear. It was really the prosecution
25 strategy of the patent owner in this case.

01:27 1 And I think it's telling that if Your Honor were to find
01:27 2 even one of these limitations -- and we think all 25 would be
01:27 3 governed by means plus function, but if one of -- if you were
01:27 4 to find that one of these limitations should be governed by
01:27 5 means plus function, the patent owner has given you absolutely
01:27 6 no guidance as to what it thinks would be the disclosure. It
01:27 7 simply argues that our evidence, both extrinsic and intrinsic,
01:28 8 doesn't meet the clear and convincing standard of
01:28 9 indefiniteness. But how do you meet that standard? You
01:28 10 identify what you think is the closest you can. You identify
01:28 11 the gaps, and presumably a patent owner would then argue, well,
01:28 12 no. You're missing this, and this is part of the disclosure,
01:28 13 but they haven't done that in this case. They just keep
01:28 14 pointing to existing wireless communication protocols in an
01:28 15 invention that specifically says that our invention is a
01:28 16 modification of those protocols. So, again, this goes back to
01:28 17 the notice function and the importance of the notice function
01:28 18 associated with it.

01:28 19 Now, if we can go to Slide 13, you know, it's our position
01:28 20 that Dyfan can't come up here today and all of a sudden have a
01:28 21 new position. It's already submitted its briefing. In its
01:28 22 briefing it doesn't make any reference to any of the actual
01:28 23 claimed functions that are performed by any of the code
01:28 24 limitations, any of the system limitations that are in dispute.
01:28 25 So that's for Williamson Step 1.

01:28 1 And like I said, in the event that the Court were to find
01:29 2 that all or one of these terms were to be governed by means
01:29 3 plus function, they provided Your Honor with no identified
01:29 4 disclosure as an algorithm for performing the entire function
01:29 5 recited. And so it can't do so today. It can't do so here. I
01:29 6 mean, its points -- that was the date it wanted to bring to the
01:29 7 dance, and it can't tonight, when the slow song comes on, pick
01:29 8 another date. It's got to come to the dance with the date it
01:29 9 brought.

01:29 10 Go to Slide 14. And so again this was the -- this was the
01:29 11 point I'm making. A threshold question that needs to be asked
01:29 12 when we're dealing with post-Williamson computer-implemented
01:29 13 functions is you ask yourself -- you have to look at the
01:29 14 function, and the reason you have to look at the function is
01:29 15 you say is this function a general purpose function or a
01:29 16 special purpose function because that dictates what aspect of
01:29 17 the Williamson test you apply.

01:29 18 And so Dyfan's first argument is that you look at code,
01:30 19 code is not a nonce word and, therefore, you don't need to look
01:30 20 at the function. Regardless of the function, code is not a
01:30 21 nonce word. It's sufficiently a definite structure. That's
01:30 22 its first argument. That's just absolutely not the law.

01:30 23 And because you have to look at the function, that
01:30 24 position would only hold true once you look at the function and
01:30 25 you say this is something I can plug into the wall and it

01:30 1 works. That's something performs. So that's the only time
01:30 2 that you would not be looking at -- need to look further than
01:30 3 whatever -- to say does this have a sufficiently definite name
01:30 4 for a structure?

01:30 5 If we can go to Slide 15. And I briefly made reference to
01:30 6 this argument. I don't want to belabor this point, but Dyfan's
01:30 7 point -- the statement that they made in their reply brief is
01:30 8 that the patentee repeatedly and consistently stated that no
01:30 9 terms -- and all of the emphasis in this slide is from their
01:31 10 briefing -- no terms were governed by 112-6, and thus
01:31 11 unequivocally disclaimed any such interpretation. The
01:31 12 statement that, according to the patent owner, unequivocally
01:31 13 disclaimed 112-6 are sitting on this slide. These are
01:31 14 self-serving statements made by a patent attorney.

01:31 15 Your Honor's very well aware of the prosecution history
01:31 16 disclaimer from the Festo case revolves around whether
01:31 17 amendments or arguments are made to overcome a rejection, that
01:31 18 they narrow the scope of the claim and that they result in
01:31 19 allowance of the claim. That's what a disclaimer is. And
01:31 20 those facts certainly don't exist here. It's not even clear
01:31 21 that anyone at the Patent Office even looked at these
01:31 22 sentences.

01:31 23 In a rule like Dyfan would seek the Court to adopt would
01:31 24 single-handedly unwind what the Federal Circuit did in the
01:31 25 Williamson decision. If you read the Williamson decision,

01:32 1 there is a very explicit reason why it decided to overturn the
01:32 2 precedent that it was. And there were two reasons. One, it
01:32 3 said we're putting a thumb on the scale. And we can't do that.
01:32 4 We're inappropriately putting the thumb on the scale.

01:32 5 And, number two, there was a trend of proliferation of
01:32 6 functional claiming that was, quote, untethered to 112-6, and
01:32 7 three of the strictures that were set forth in that statute in
01:32 8 adopting a rule like this would excoriate means plus function.
01:32 9 So that should not be -- that is not the standard.

01:32 10 So if we can go back -- with that background again, let's
01:32 11 go back to our example -- group 2 example function, Slide 31.
01:32 12 And, again, what we have here, these -- this is what the patent
01:32 13 owner has identified as being the structure for performing this
01:32 14 function. And the question is -- you've got code configured
01:32 15 for execution on a mobile device. You have a plurality of
01:33 16 mobile devices communicating via wireless protocols and at
01:33 17 least one communicating with a server via another wireless
01:33 18 protocol. And the question that really -- is that sufficiently
01:33 19 definite structure to perform this special purpose function of
01:33 20 causing to be output via the mobile device visual information
01:33 21 and with these three categories in response to the receipt of
01:33 22 the second response message. So the question is, how does it
01:33 23 do that? How does the code perform that in receipt of the
01:33 24 second response message? How does the code perform that caused
01:33 25 to be output after the first visual information is caused to be

01:33 1 output? We don't know. The claim doesn't say it, and
01:33 2 apparently the disclosure doesn't say it either or the patent
01:33 3 owner would have identified it.

01:33 4 And how does the code perform this function of cause to be
01:33 5 output after the at least one mobile device is moved in the
01:33 6 building? Essentially what you have here is purely functional
01:33 7 claiming. It is trying to capture every single technique for
01:34 8 ever doing this, and that is contrary -- that is 100 percent
01:34 9 contrary to the quid pro quo. They need to tell us what the
01:34 10 metes and bounds are either in the claim or otherwise, and
01:34 11 that's just not present here.

01:34 12 So with this -- this is a very -- I think a very clear-cut
01:34 13 example of a function for which there is not structure that is
01:34 14 sufficiently definite to perform this function that's claimed.

01:34 15 And we can go to Slide 32. So going to Williamson Step 2,
01:34 16 as we discussed above, we did our best to try to identify what
01:34 17 we think are the closest aspects of the description and to
01:34 18 identify what we think is missing at the same time. And,
01:34 19 again, Dyfan hasn't provided any disclosure at all. It hasn't
01:34 20 pointed in the specification for this function, this particular
01:34 21 function in term 14 a representative term for group B. It
01:34 22 hasn't identified any disclosure for any function. It's --
01:35 23 there are clearly gaps, and there's no disclosure that anyone
01:35 24 can identify, and I think that's telling.

01:35 25 So the closest aspect of the patents's disclosure you're

01:35 1 going to find are essentially the same in each of these -- each
01:35 2 of these various limitations, and there's a reason for that.
01:35 3 And the reason for that is simply they added a lot of
01:35 4 functional limitations that weren't tied to the specification,
01:35 5 and that's what we're dealing with.

01:35 6 And so we have here -- we identified a number of places in
01:35 7 Figure 12 where it talks about a mobile terminal receiving a
01:35 8 message and taking an action based on the payload or the header
01:35 9 data. They're talking about that location header data in the
01:35 10 message and then displaying elements.

01:35 11 And then it has a number of -- there's -- you can take an
01:36 12 action. It could be to display certain elements of the message
01:36 13 payload. It could be to produce other types of user interface
01:36 14 signals usable by the mobile terminal.

01:36 15 Again, when you read this, it looks like a flowchart, and
01:36 16 it is a flowchart. It's a flowchart for how data is
01:36 17 distributed in the system. It is not a flowchart that
01:36 18 describes anything other than results. It doesn't say how you
01:36 19 take information and display it. It doesn't say how you take
01:36 20 information and you produce -- use other types of user
01:36 21 interface signals, and it certainly doesn't show you how you
01:36 22 cause to be output visual information based on the payload or
01:36 23 the header. That's not even what's claimed. And it doesn't
01:36 24 show you that you do it in response to the receipt of the
01:36 25 message and after the first visual information is caused to be

01:36 1 output and after the at least one mobile device is moved in the
01:36 2 building. There's nothing even remotely related to that in
01:36 3 this figure.

01:37 4 So then we went to the '197 application. The '197
01:37 5 application has this identical figure. And the '197
01:37 6 application adds Figures 3 and 4. It adds this concept of a
01:37 7 location based trigger and a relevancy based trigger. Neither
01:37 8 of those are claimed in any of these representative functions.

01:37 9 But the problem with the '197 application is that it
01:37 10 intentionally devoids any structure from being associated with
01:37 11 any of these functions, including the functions that itself
01:37 12 describes. And we identified a list, and we enumerated this
01:37 13 extensively in our opening brief, but we provided a number of
01:37 14 those things. So the question is can this type of description
01:37 15 fill in the gaps of Figure 12 from the provisional, and the
01:37 16 answer is no. Because there is really no structure that's tied
01:37 17 to that function. Is there structure tied to causing to be
01:37 18 output via the mobile device, the second visual information
01:38 19 based on the second location relevant information after those
01:38 20 three things in response to receiving the second location
01:38 21 relevant information in a response message, after the first
01:38 22 visual information is output from the mobile device and after
01:38 23 the -- and after the at least one mobile device is moved in the
01:38 24 building. The answer is no. Because that's not what
01:38 25 this -- that's not what the provisional said was the invention.

01:38 1 That's not what the '197 application, which is the same
01:38 2 specification as the patents, other than the summary of the
01:38 3 invention, which is just a copy of the claims. That's not what
01:38 4 these patents are about.

01:38 5 So they added this column and a half of limitations,
01:38 6 including this limitation, and there is no -- there is no
01:38 7 structure. There's no disclosed algorithm. This is a special
01:38 8 purpose function. There's no disclosed algorithm for
01:38 9 performing this.

01:38 10 If we go to Slide 35. And the reason that there is no
01:39 11 disclosed algorithm -- because the patent, it does show
01:39 12 displaying content in the -- from the message payload or the
01:39 13 message header of a received message. It does show producing a
01:39 14 user interface signal based on the payload and header data.
01:39 15 What it does not do is clearly link that -- those
01:39 16 descriptions -- those high level results -- again, that's not
01:39 17 an algorithm -- those high level results to even resolve claim,
01:39 18 that functional resolved claim. It's not tied to that.

01:39 19 And then they don't detail -- they don't even provide any
01:39 20 detail, the provisional doesn't, on how the high level
01:39 21 displaying, the high level producing results happen. So it
01:39 22 doesn't even show how to do -- how to -- how to perform the
01:39 23 results that are specified in a couple steps of its flowchart,
01:39 24 and it certainly doesn't provide the algorithm, the
01:39 25 step-by-step algorithm for how this recited function is

01:40 1 performed.

01:40 2 And Williams demands this -- an element -- a
01:40 3 limitation-by-limitation, a function-by-function fact-dependent
01:40 4 analysis for each claim limitation.

01:40 5 And one thing before I maybe turn it over, if we're going
01:40 6 to do some ping-pong, would be, I actually want to go and just
01:40 7 show you because there's been a lot of briefing on other
01:40 8 examples of claims that courts have found to be either means
01:40 9 plus function or not means plus function.

01:40 10 And let's go to Slide 20 first. So this is a Cypress Lake
01:40 11 decision. This is -- in our briefing it's 382 F.Supp. 3d 586.
01:40 12 This is one of the claims that Judge Payne found that all of
01:40 13 the functions in red -- in orange were means plus function
01:40 14 limitations, and one of those four functions was found to be
01:40 15 indefinite for failure to disclose any corresponding structure
01:41 16 in the specification.

01:41 17 And what you can see here is you've got -- the structure
01:41 18 that's provided here for these functions are a computer program
01:41 19 product embodying on a nontransitory computer readable medium
01:41 20 comprising -- and then there's various elements of code. One
01:41 21 of the elements of code is code for detecting a user input and
01:41 22 corresponding to the first navigation control. And essentially
01:41 23 what the Court found is that you disclose structure where the
01:41 24 code was run. It was run on this tangible computer readable
01:41 25 medium. Use disclosed code. But other than that, the only

01:41 1 thing this claim has is it's reciting the function. These are
01:41 2 all, the Court found, are special purpose computer functions.

01:41 3 So looking at the code, it did not turn, rise and fall on
01:41 4 whether code was a nonce term. No. It rose and fall because
01:41 5 all of these can't be performed when you plug -- by plugging a
01:41 6 computer into the wall that you buy at Best Buy.

01:42 7 And a critical point is that -- in the Cypress Lake is
01:42 8 that Judge Payne said that although there are examples in the
01:42 9 Patent Office for this kind of -- that would kind of -- it's
01:42 10 similar to the situation we have here. They're kind of related
01:42 11 to what is claimed but not really. He said just because one of
01:42 12 those disclosures might enable a person to make and use the
01:42 13 invention -- and this is the exact performance that Williamson
01:42 14 did in its limitation. Just because you could -- because a
01:42 15 person could create a program, a person of ordinary skill could
01:42 16 create a program, that's not sufficient under Step 1 of
01:42 17 Williamson and it's not sufficient under Step 2 of Williamson.
01:42 18 And Judge Payne noted that here.

01:42 19 If we go to the next slide, 21. This is another claim
01:42 20 which -- in the Advanced Ground case, which we also cite in our
01:42 21 briefing, where again this was a claim that did not recite
01:42 22 sufficient structure to perform a special purpose function.
01:43 23 And this is -- this is one that went up to the Federal Circuit
01:43 24 and for -- and was affirmed.

01:43 25 And here I think there's kind of a parallel to what we

01:43 1 have claimed in our claims, even though our claims are a heck
01:43 2 of a lot longer than this. You have a cellular phone
01:43 3 transmitter and receiver. That's structure. You have a CPU.
01:43 4 That's structure. It's connected to the cellular phone
01:43 5 transmitter and receiver.

01:43 6 And then it claims CPU software for performing a function.
01:43 7 Well, what's the function say? Selectively pulling other
01:43 8 participants with a cellular phone. It's very similar to our
01:43 9 situation where we've got -- there's some structure. Nobody's
01:43 10 denying there's some structure. We looked at that. We
01:43 11 examined it. Our expert examined it. The whole point is we're
01:43 12 not saying there's no structure. We're saying that there is
01:43 13 not sufficient structure to perform the function in the claim.
01:43 14 That's what we're saying.

01:43 15 If we go to Slide 22. This is another Global Equity case,
01:44 16 another Judge Payne decision. And, again, what he's looking at
01:44 17 here is, again, special purpose computer functions, and he's
01:44 18 saying, is there sufficient structure claimed to perform these
01:44 19 functions? So you have a little bit more here than maybe you
01:44 20 did in either of the Cypress Lake case or the Advanced Ground
01:44 21 case. You have a little bit more structure talking about the
01:44 22 program product. You have a memory. You have a display. You
01:44 23 have an operating system. You have computer reasonable medium
01:44 24 running the code, and then you have program code. And for each
01:44 25 of these limitations in orange Judge Payne said they're all

01:44 1 means plus function because that's not sufficient structure for
01:44 2 performing special purpose computer functions like manipulating
01:44 3 the virtual cabinet record through the cabinet visible
01:44 4 partition window. All of these were not only found to be
01:44 5 governed by 112-6 under Williamson but were also found to be
01:45 6 indefinite by Judge Payne.

01:45 7 If we go to Slide 24. So Slide 24 is a case that the
01:45 8 patent owner cites in its briefing. And this has got a lot of
01:45 9 green. And the reason this has so much green is because what
01:45 10 these claims -- what the functions actually claim -- and this
01:45 11 is a system. It's an enclosed system. Okay? It is a system
01:45 12 for managing pharmacy kits. And all of the functionality is
01:45 13 being claimed as being interactive within, you know, what
01:45 14 appears to be sort of a single box. And you're receiving -- so
01:45 15 the concept of receiving tag information, that function, of a
01:45 16 plurality of RFID tags, the function is disclosed right below
01:45 17 that. It says exactly how you do that. How do you receive
01:45 18 them and how do you know that they're tied to these medicinal
01:45 19 containers.

01:45 20 You go to the next function, verify the plurality of
01:46 21 medications using the tag information. The algorithm is
01:46 22 literally the next three green sections there. That is the
01:46 23 algorithm for performing the verify function. And all of these
01:46 24 elements are tied together in this box.

01:46 25 And then you get to the Zeroclick decision, which is one

01:46 1 that has been briefed a lot.

01:46 2 If we can go to Slide 23. And, again, this is a claim
01:46 3 where you have a device, and the device -- the entire purpose
01:46 4 of this device is what the functions are performing. And so
01:46 5 you can see the function here is user interface code configured
01:46 6 to detect one or more locations touched by a movement of the
01:46 7 user's finger on the screen without requiring the exertion of
01:46 8 pressure and determine therefrom a selected operation.

01:46 9 If you look at the first three limitations -- and this is
01:46 10 exactly what the Federal Circuit said. Number one, it said
01:46 11 this was a relatively simple function, not what we have in this
01:46 12 case. And if you read those first four limitations of
01:47 13 structure, it is identifying the exact structure by which you
01:47 14 would perform that function.

01:47 15 And the other thing that the Federal Circuit looked at is
01:47 16 it said, okay. Let's look at the Spec 2, and the spec just
01:47 17 confirmed that all the -- all this function was doing was
01:47 18 claiming a minor modification to what was in an existing
01:47 19 touchscreen. And so it was -- there was already -- it was
01:47 20 identifying there was already code for doing exactly this, and
01:47 21 we tell you exactly how to make the modification. So Zeroclick
01:47 22 is -- again, this is a -- this is not the case we have here.
01:47 23 This is not the case we have here. This is with claims that
01:47 24 are just divorced from -- devoid of structure and then looking
01:47 25 to a specification where -- the reason that the claims don't

01:48 1 have them is because the patent owner intentionally expanded
01:48 2 the scope to cover something it didn't invent.

01:48 3 If the patent owner had covered its invention, if it had
01:48 4 talked about using a location header in a message, if it had
01:48 5 talked about how that message is used and followed a flowchart
01:48 6 and then explained how it would be done, we might not be here.
01:48 7 There would be a couple reasons we wouldn't be here. One, we
01:48 8 wouldn't be here because that claim would not be a means plus
01:48 9 function claim, potentially. But, number two, we wouldn't be
01:48 10 here because no one in the industry practices that, including
01:48 11 Target. Nobody's using location headers, and that's why the
01:48 12 patent owner went the path it did in 2014, presumably.

01:48 13 So with that, that's really the first limitation. It
01:48 14 gives you an overview of our arguments. What I'll say about
01:48 15 the other limitations, both the code limitations and the system
01:48 16 limitations, we walk through, look at each of those functions,
01:48 17 and we are looking at what is the example structure, what's the
01:49 18 max structure that can be identified in the claim, including
01:49 19 based on the patent owner's arguments, and we look to the
01:49 20 specification in Step 2. What you'll notice is that for each
01:49 21 of those limitations the disclosure that we've -- the closest
01:49 22 disclosure we can identify is the same as what we went over.
01:49 23 And the closest claim elements that we can identify
01:49 24 as performing -- as providing structure are in -- are virtually
01:49 25 identical with a few tweaks based on which claim it is, but

01:49 1 other than that, they're the same. So a lot of this is really
01:49 2 streamlined and provided to you within this first example
01:49 3 representative limitation.

01:49 4 But if you don't have any questions, Your Honor, I can
01:49 5 have Mr. Dahlgren come up, and I can address the other
01:49 6 limitations after that.

01:49 7 THE COURT: Sounds good.

01:49 8 MR. TYSON: Thank you.

01:49 9 MR. DAHLGREN: Your Honor, if it pleases the Court if
01:53 10 you're ready. What we've heard today is, I think, more of the
01:53 11 same. Plaintiff is attempting to turn this into a priority
01:53 12 contest on one hand. And if you go to Slide 18 --

01:53 13 (Brief off-the-record discussion.)

01:54 14 MR. DAHLGREN: Maybe I could take you up on your offer to
01:54 15 help. I apologize.

01:55 16 So looking at this slide, I think it's noteworthy that the
01:55 17 bottom case, the Uniloc case, was cited by defendant in their
01:55 18 briefs, and there actually the Federal Circuit said that the
01:55 19 proper analysis or the term priority involving construing
01:55 20 claims under 112-6 is to first determine the claim under 112-6
01:55 21 and then look to whether or not there's original disclosure
01:55 22 described in the priority documents, and it's not looking at
01:55 23 that original disclosure in the first instance to determine if
01:55 24 the claim is governed by 112-6, and that goes in vein with the
01:55 25 Trading Techs case and the legal case where written description

01:56 1 is noted to be distinct from claim construction. And so I
01:56 2 think the entire line there and in terms of the alleged
01:56 3 prosecution's history strategy is about adding numerous
01:56 4 amendments, which as we know those narrow the claims, and to
01:56 5 the extent that there's columns and columns of amendments,
01:56 6 that's columns and columns of narrowing amendments. So that --
01:56 7 I don't think there's anything inherently improper in doing
01:56 8 that. And I think that kind of misses the point.

01:56 9 And so what I'd like to do now -- what we did was, we
01:56 10 created a claim trying -- again, because, as defendant notes,
01:56 11 it's hard to fit this all into one screen. And I have copies.

01:56 12 Oh, it's working now? I'll just keep using the ELMO.
01:57 13 Thank you.

01:57 14 And if it's alright if I could bring copies of these up
01:57 15 just for your assistant.

01:57 16 THE COURT: Sure.

01:57 17 MR. DAHLGREN: So I'm on -- it's representative term 14,
01:57 18 which is the second term -- I guess the term out of the second
01:57 19 grouping. It's on Page 7 is where it starts. And what we
01:57 20 attempted to do -- excuse me. Term 14, yeah, Claim 15. Of the
01:57 21 two -- of the -- should be the '292 patent. There's a typo
01:57 22 there. I apologize.

01:57 23 But what we have here is a -- I apologize for the
01:58 24 highlight, but we tried to go through, as identified by
01:58 25 highlight, what's the structure in the claim and what is kind

01:58 1 of more like the functionality, the language that recites the
01:58 2 objectives of the claim gives it context?

01:58 3 And if you turn to -- it's Page 12 and 13. So in 12 you
01:58 4 have the beginning of the disputed term, said code when
01:58 5 executed further configured to. And then on 13 you have the
01:58 6 remainder. And here what we know is that there's a lot of
01:58 7 structure in this claim, and I think it is undisputed that the
01:58 8 law allows for the claim to also recite the -- essentially the
01:58 9 manner in which the accused functionality is performed. And
01:59 10 here there's a lot of structure that goes to how the claim is
01:59 11 achieving this. And you also have to consider that it's
01:59 12 referring to -- again, if you go back to Page 12, said
01:59 13 application -- or excuse me. Said code. And so that
01:59 14 necessitates going further back and looking at where the code
01:59 15 is first introduced, which is on Page 8.

01:59 16 And so here you have code that performs a variety of
01:59 17 functions, and it's noteworthy that defendant's own expert,
01:59 18 Dr. Goldberg, noted in a declaration in a different matter that
01:59 19 we thought was fairly similar that while the claim may -- if
01:59 20 you look at it, the function, isolation -- be quite broad or
02:00 21 whatever. It -- it does specify a very specific manner for
02:00 22 doing it, and that is Paragraph 18 -- or excuse me -- 19 of
02:00 23 Exhibit 1 of our responsive brief which I will put up for you
02:00 24 momentarily if I can locate it.

02:00 25 But his own expert gave a lot of testimony in, you know,

02:00 1 his declaration in that case supporting claims that we think
02:00 2 were quite similar and supporting them on the basis that the
02:00 3 claim language itself provided an adequate algorithm for that.

02:00 4 I apologize. I believe I misspoke about the exact cite for
02:01 5 that. Okay. No. So here it is. But here you have the
02:01 6 limitation. Computational apparatus for testing the software
02:01 7 application by imposing a fake behavior onto at least one
02:01 8 coupled software component, wherein imposing includes removing
02:01 9 or replacing expected behavior of at the least one coupled
02:02 10 software component during runtime.

02:02 11 And at the end -- excuse me. Well, and what he says is
02:02 12 that the claim limitation provides both the function of the
02:02 13 claimed computational apparatus as well as a structure, and
02:02 14 that is the function testing software application specifically
02:02 15 supported by algorithmic structure imposing a fake behavior on
02:02 16 the at least one coupled software component, wherein imposing
02:02 17 includes removing or replacing expected behavior of the at
02:02 18 least one coupled software component during runtime.

02:02 19 And the last sentence, I think, is what's most critical
02:02 20 that stood out to me. Although there are of course many ways
02:02 21 to perform this function of testing the software, the claim
02:02 22 element recites only a particular way of doing so in a manner
02:02 23 whose scope is clear to a person of ordinary skill in the art.
02:02 24 I would say that the same holds true for the accused or alleged
02:03 25 112 Paragraph 6 limitations that Target has identified.

02:03 1 Here what you have is code configured to after first
02:03 2 visual information is caused to be output based on the first
02:03 3 location relevant information after the at least one mobile
02:03 4 device is moved in the building and in response to receipt from
02:03 5 the at least one server and via the second wireless
02:03 6 communication protocol of the second response message,
02:03 7 including the second location relevant information used to the
02:03 8 output via the at least one mobile device, the second visual
02:03 9 information based on the second location relevant information.
02:03 10 That's a very, very, very specific way of implementing the
02:04 11 function. A very intricate way. And so I would say that that
02:04 12 provides sufficient algorithmic support itself in the claim,
02:04 13 notwithstanding all the other structural elements that are also
02:04 14 already present.

02:04 15 Now, they also -- counsel spoke about the prosecution
02:04 16 history and its use, you know, in this case, and in our reply
02:04 17 brief we cited to a fairly recent Federal Circuit decision, MTD
02:04 18 Products. So MTD Products vs. Iancu. And we cited to, you
02:04 19 know, another passage because we wanted to make it clear that
02:04 20 this was kind of a reverse situation. The party had found
02:05 21 themselves in a -- patentee had found themselves in an IPR and
02:05 22 was actually arguing for means plus function and the board
02:05 23 found that they had basically, you know, disclaimed it based on
02:05 24 statements in the prosecution history during the original
02:05 25 prosecution about -- alleging, you know, structural components

1 of the claim. But at the very end the Court noted that given
2 the lack of any clear and undisputed statement, foreclosing the
3 application of 112 Paragraph 6, we conclude that the board
4 erred in giving dispositive weight to the equivocal statements
5 it cited in the prosecution history.

6 And I would say that compared to the statements there
7 where the patentee said, well, there is, you know, some
8 structure in the claim, here we have repeatedly and
9 consistently throughout prosecution of this patent family
10 stated that none of these terms are intended to be governed by
11 112 Paragraph 6, and not once has the Patent Office said that,
12 you know, that was wrong.

13 And as we pointed out in the Markman case, yes, subjective
14 intent is -- is given little weight in many instances, like an
15 inventor testifying after the fact that a claim has a certain
16 meaning, which is one of the cases that they cited to, that the
17 District Court cited to when they said that the Federal Circuit
18 has soundly rejected this, which I think is a far cry from what
19 actually is the case. But after the fact and better testimony,
20 sure. You could say that their intents, as they're saying it
21 now, doesn't really matter. But when it's a part of the
22 official record, the file history and is repeatedly stated
23 during that file history, the public is on notice. They have
24 been informed. Counsel talked a lot about the public notice
25 function of claims in the intrinsic record, and I think this

02:07 1 goes just to that. And I think with the Federal Circuit case,
02:07 2 the recent case on our side -- and I think the prosecution
02:07 3 history is a significant factor in this case.

02:07 4 And that leads me to kind of, I think, the larger point.
02:07 5 What we argued primarily in our briefs was that, you know, we
02:07 6 group all these terms together because to us there was no
02:07 7 getting past Step 1. The claims themselves had sufficient
02:07 8 structure disclosed in them. And when we deposed Dr. Goldberg,
02:07 9 he recognized repeatedly that he did not consider various
02:07 10 wireless protocols, that, yes, you know, the server and even
02:07 11 message and all these things connoted structure and they were
02:07 12 all things that did not factor into his analysis. And so it's
02:07 13 basically a failure of meeting their burden. And even if it's
02:07 14 a preponderance standard, I still submit that they haven't met
02:07 15 that burden. And so there's no need to go to the
02:07 16 specification. For us they never passed the -- you know, the
02:08 17 first step. So, you know, did not pass go. Do not collect
02:08 18 their \$200 or whatever it is, the Monopoly reference.

02:08 19 But we believe firmly that they didn't make that even
02:08 20 threshold showing and that any resortment to the specification
02:08 21 then is unnecessary and improper. And the claims provide
02:08 22 significant details about how the various functions are
02:08 23 achieved. And a person of skill in the art would rarely
02:08 24 understand that. And Dr. Goldberg, in fact, testified in prior
02:08 25 cases regarding similar claims that that was, in fact, the

02:08 1 case.

02:08 2 And so given his statements about acknowledging the
02:08 3 structure and not considering it in his analysis and not
02:08 4 considering the file history, you know, we believe that, you
02:08 5 know, these claims essentially, you know, aren't -- don't fall
02:08 6 under a means plus function of the exception and just should be
02:08 7 given their ordinary meaning, which I don't think they've
02:09 8 identified any dispute other than the output dispute of the one
02:09 9 claim. And so there's other disputes within these many claims
02:09 10 that they thought were there additionally, you know, they could
02:09 11 have identified them as well, but since they haven't, there
02:09 12 doesn't seem to be any disagreement that if it doesn't fall
02:09 13 under 112-6 that they can't, you know, understand -- reasonably
02:09 14 discern the scope of the claims.

02:09 15 So, Your Honor, if you have any questions, it's -- for us
02:09 16 it's a fairly simple argument. It's kind of a threshold issue.

02:09 17 THE COURT: I have no questions.

02:09 18 MR. DAHLGREN: Okay.

02:09 19 THE COURT: Josh?

02:09 20 (Conference between the Court and Mr. Yi.)

02:10 21 THE COURT: The Court finds that the terms in group 2 or
02:10 22 group B, whichever we want to call it or reference is, recite a
02:10 23 function, and thus are governed by Section 112 Paragraph 6.
02:10 24 The Court also finds the claims and specification do not recite
02:10 25 sufficient structure. This term appears to be similar to the

02:10 1 Advanced Ground case cited on Slide 21 of Target's slide deck;
02:10 2 therefore, the Court finds that the term is indefinite for lack
02:10 3 of sufficient structure.

02:10 4 What group do we want to take up next?

02:11 5 MR. TYSON: Your Honor, we can -- we can speak to -- give
02:11 6 me one second.

02:11 7 So if we can go to Slide 18, please. This will be the --
02:11 8 oh, sorry, Your Honor. Actually it's Slide 17.

02:11 9 THE COURT: With respect to the ones in group 1, which
02:11 10 will be terms 10, 11 and 12, are there any substantive
02:11 11 arguments that were not just made?

02:12 12 MR. TYSON: No, Your Honor. It's very similar. The only
02:12 13 thing that I would add is, in case this was not clear from my
02:12 14 original presentation, was that a lot of the structure that
02:12 15 is -- that counsel is talking about is outside of the phone.
02:12 16 It's outside of the device. It has nothing to do with what's
02:12 17 happening on the phone, what's happening with that application.
02:12 18 I think that's a really critical distinction from the Typemock
02:12 19 case and it sort of puts it more in parallel to, as Your Honor
02:12 20 identified with the group 2 terms, the AGIS case. But I have
02:12 21 no substantive differences to our view with respect to the
02:12 22 group 1 terms.

02:12 23 THE COURT: Mr. Dahlgren, do you have any substantive
02:12 24 arguments to make in addition to what you've already done for
02:12 25 the group 1 terms, which would be terms 10, 11 and 12?

02:12 1 MR. DAHLGREN: Your Honor, we briefed the terms together,
02:13 2 so it's really the same arguments.

02:13 3 THE COURT: And it will be the same claim construction.

02:13 4 MR. DAHLGREN: Okay.

02:13 5 THE COURT: Why don't we move to the next set that contain
02:13 6 wherein clauses?

02:13 7 MR. TYSON: Slide 37. And again, Your Honor, for the
02:13 8 system limitations that are in dispute, the wherein clauses
02:13 9 that include a system, again, this is sort of a unique
02:13 10 argument.

02:13 11 THE COURT: Well, let me know which group you're talking
02:13 12 about.

02:13 13 MR. TYSON: I'm going to start with group 3.

02:13 14 THE COURT: And that's terms 16, 17, 21, 28 and 29?

02:13 15 MR. TYSON: Yes, Your Honor.

02:13 16 THE COURT: Yes, sir.

02:13 17 MR. TYSON: And on Slide 37, again, what I tried to do was
02:14 18 summarize what I believe the plaintiff's arguments are here,
02:14 19 and this is a little bit different than the code arguments in
02:14 20 that the argument is again that system is not a nonce word in
02:14 21 these particular claims, and the argument is that because this
02:14 22 system, the recited system, includes a building, a short-range
02:14 23 communications unit, a plurality of mobile devices, the code
02:14 24 and server.

02:14 25 But again, the argument is, again, because it has these

02:14 1 five components which are structure, some structure, that you
02:14 2 don't need to look at the function because there's structure
02:14 3 recited in the claim. And so regardless of whatever the
02:14 4 structure -- regardless of the function, that that -- this
02:14 5 composite combination or, you know, component of the system
02:14 6 would be sufficient to perform that. And I think again that
02:14 7 that's contrary to the law. That structure is not -- is
02:15 8 disconnected to the functional language for the same reason I
02:15 9 talked about before. This is -- these are functions -- in
02:15 10 large part with these system claims, you know, it's hard to
02:15 11 tell where they're operating. It's hard to tell which is
02:15 12 performing it. The patent owner hasn't identified which of
02:15 13 these -- what the combination or if it's just one of these
02:15 14 components, if it's any of these components. It's not clear.

02:15 15 THE COURT: What impact does the use of the wherein
02:15 16 limitation have on this?

02:15 17 MR. TYSON: Well, I think the case that the patent owner
02:15 18 cited actually supports our position because it says that you
02:15 19 still need to look at what the function is -- what it's saying.
02:15 20 So just because there's a wherein clause doesn't mean that,
02:15 21 again, it's sort of like it doesn't mean that this language is
02:15 22 not subject to anything else. So if it's only claiming a
02:15 23 result of something that happened earlier, if that's all that
02:15 24 it's claiming -- and I can actually show you kind of where that
02:15 25 comes in. And, in fact, let me show you that really quick.

02:15 1 THE COURT: Okay.

02:16 2 MR. TYSON: Let's go to Slide 39. And so one of the
02:16 3 things when Dr. Yi identified term 28 -- this is an
02:16 4 important -- this was actually directly to your point, Your
02:16 5 Honor, is that Claim 25 would not be representative, in our
02:16 6 opinion, of this group 3 terms because without its dependency
02:16 7 on Claim 11, without the dependency on the function of Claim
02:16 8 11. And so the reason that we included 28 was merely because
02:16 9 rather than include a whole separate category to group in Claim
02:16 10 28, we identified it in with this other group.

02:16 11 But essentially what you have here is because you have the
02:16 12 wherein the system is configured that -- and, again, we have
02:16 13 this sort of two criteria, after the indication of the user
02:16 14 input is received and after the output of the visual
02:16 15 information is caused, now we have subsequent output of
02:16 16 different visual information is caused as the mobile device is
02:16 17 moved among plurality of facilities of the building.

02:17 18 So that's very clearly a new function. It is a function
02:17 19 that is newly performed. It's not simply referring back to
02:17 20 some function that was previously performed. These are
02:17 21 functions that are performed. And Claim 25 has the language
02:17 22 that wherein the subsequent output of the different visual
02:17 23 information is capable of being caused without additional user
02:17 24 input. So here that's not claiming the performance of a
02:17 25 function. That is claiming a capability. And in that case

02:17 1 it's likely that for this particular term would not -- would
02:17 2 not by itself be representative of the additional function.

02:17 3 So -- and if we go to Slide 40, this is just another way
02:17 4 of looking at that -- of seeing this function is coming out.
02:17 5 It's written a little, you know, strangely, but it is a
02:17 6 function. I mean, it is absolutely saying that the system is
02:17 7 configured to cause subsequent output of different visual
02:18 8 information as the at least one mobile device is moved among a
02:18 9 plurality of facilities of the building. And then again, it's
02:18 10 after the indication of the user input is received as well as
02:18 11 the output is after the output of the visual information is
02:18 12 caused.

02:18 13 And -- and so again, if we can contrast that -- again, now
02:18 14 let's go to the -- let's just look briefly at the group 4 term
02:18 15 in term 28. At Slide 45. I'm sorry.

02:18 16 Here is where you have Claim 19, Your Honor, which is
02:18 17 again dependent on that same Claim 11. Now, Claim 19 is
02:18 18 actually adding an additional functional limitation on to Claim
02:18 19 11. So you have the Claim 11 function that we said was being
02:18 20 performed by the system. Well, we now have the system in Claim
02:18 21 19 performing the additional function that the visual
02:19 22 information is automatically caused to be output without
02:19 23 requiring further communication with the at least one broadcast
02:19 24 short-range communication unit and again after the receipt of
02:19 25 the indication of the receipt of the one or more messages.

02:19 1 So looking at that claim on Slide 46, what Claim 19 did
02:19 2 is, we went from causing subsequent output of different visual
02:19 3 information as the at least one mobile device is moved among
02:19 4 the plurality of the facilities of the building to
02:19 5 automatically causing that subsequent output, and then it adds
02:19 6 these additional criteria. We had the two criteria from Claim
02:19 7 11. Now we have four criteria that are being added onto this
02:19 8 thing.

02:19 9 So this is -- I think that your question was very astute
02:19 10 and it was directly on point that I think these claims are
02:20 11 showing the difference. If we're just claiming wherein a
02:20 12 capability is happening or wherein -- wherein a phrase that is
02:20 13 not tied to a function that is being performed, then -- then we
02:20 14 may not be here. We may not be having this conversation. But
02:20 15 that's the -- I can't remember the exact case that they cited.
02:20 16 I don't have it off the top of my head, but that case -- in our
02:20 17 reply brief we identify how that case actually supports our
02:20 18 position because it is looking at this and saying is this a
02:20 19 function? Is this a new function that's being performed? And
02:20 20 that's exactly what we have here.

02:20 21 If we can go -- sorry for jumping around here, but if we
02:20 22 can go to slide -- let's go to Slide 41 again. So 41, this is
02:20 23 where we're looking at, you know, the combination of Claim 11
02:20 24 and 25 and the function really being what's in Claim 11, and 25
02:20 25 adds a slight modification to that. But the structure here is

02:20 1 identical with one exception to what we talked about with code,
02:21 2 is that here we now have these five other components that might
02:21 3 be part of the structure. The patent owner hasn't told us
02:21 4 whether they are, whether one of them are, whether two of them
02:21 5 are, whether all five of them are. We don't really know.

02:21 6 And again so what we have is, it really comes down to
02:21 7 the -- this nonce argument that simply because system is not a
02:21 8 nonce word that we don't have to consider what this -- and
02:21 9 because it's a wherein clause, we don't have to read what the
02:21 10 claim is saying. We don't have to read this function. And we
02:21 11 have to because this is absolutely a function that's being
02:21 12 recited. We have a system here, and the system is now -- it's
02:21 13 not saying code. If this was code, we'd still have the same
02:21 14 issue we had before. But now we don't know what is -- what
02:21 15 is -- how is this happening? Is it a combination of code, some
02:21 16 kind of unknown code that isn't described in this claim for the
02:22 17 same reason as it isn't described for the other limitations,
02:22 18 along with -- you know, how does it know that the mobile device
02:22 19 is moved among the building? Is the Bluetooth -- is the
02:22 20 short-range communications unit providing some communication?
02:22 21 I mean, the concept here is, again, this is claiming every
02:22 22 single possible way that you could perform this function
02:22 23 without any metes and bounds.

02:22 24 And that's why we're here. We think these are actually,
02:22 25 you know, slightly even more difficult for anyone to resolve

02:22 1 what the actual structure is than even the code limitations
02:22 2 because now we've had this added layer of ambiguity with the
02:22 3 system.

02:22 4 And I will say -- if we go to Slide 42, all I'll say is
02:22 5 that this function we're identifying the identical -- what we
02:22 6 thought was the closest disclosure we could find. And it's
02:22 7 identical to what we presented for the group 1 and 2 terms.
02:22 8 And so I will just say that again we looked for it. We
02:23 9 identified that there were gaps in this disclosure in the
02:23 10 specification, and the patent owner has never even pointed to a
02:23 11 single thing in -- in the patent, any of the disclosure that
02:23 12 kind of resolved that dispute.

02:23 13 And so we've done our homework as far as clear and
02:23 14 convincing evidence goes. We did the best we could and looked
02:23 15 at the entire specification. We identified what we thought was
02:23 16 related. We said here are the gaps we see. And, you know,
02:23 17 it's hard to prove a negative in this case, but we've done, I
02:23 18 think -- I think it's clear and convincing. And then to have
02:23 19 the patent owner not provide any rebuttal to that kind of
02:23 20 demonstrates -- demonstrates the evidentiary amount that we've
02:23 21 already provided.

02:23 22 And I'll do the same thing with the group 4 terms. If we
02:23 23 go to Slide 46. Again, this is the group 4 term up here.
02:24 24 Here's the function being recited, with the inclusion of Claim
02:24 25 19 here. So Claim 19's adding the automatically and it's

02:24 1 adding these other two requirements onto the first two
02:24 2 requirements that Claim 11 already had to perform this
02:24 3 function. And, again, it's a special purpose function. It's
02:24 4 not something you plug into the wall.

02:24 5 And, again, we go to Slide 47. For these group 4 terms --
02:24 6 again, we did the same process that we did for all the terms,
02:24 7 looked at the provisional and looked at the application. We
02:24 8 looked at the disclosure as a whole, the intrinsic record as a
02:24 9 whole, and we identify what we thought was the closest. And,
02:24 10 again, we identified what we thought was the closest. We
02:24 11 identified gaps. We provided that in our briefing. We
02:24 12 provided it extensively in Dr. Goldberg's testimony, and the
02:24 13 patent owner, tellingly, did not identify any differences
02:24 14 between what we identified and what else was in the disclosure.
02:24 15 And so those gaps remain.

02:24 16 And so it's our belief that both the group 3 terms and
02:25 17 group 4 terms are also means plus function terms under the
02:25 18 Williamson case and that there is not corresponding structure
02:25 19 disclosed in the specification to perform the entirety of those
02:25 20 functions.

02:25 21 And so with that, Your Honor, unless you have questions,
02:25 22 that is actually all the terms that we have to cover today.

02:25 23 THE COURT: Okay. That is also all the claim terms?

02:25 24 MR. TYSON: Well, what I would say is, Your Honor, is that
02:25 25 those are the ones that we've -- we decided to -- that Your

02:25 1 Honor asked us to argue today.

02:25 2 THE COURT: Okay.

02:25 3 MR. TYSON: I think we can rest on the briefing and our
02:25 4 evidence that's already provided for the other terms.

02:25 5 THE COURT: Okay. Counsel?

02:25 6 Give me one second.

02:26 7 (Conference between the Court and Mr. Yi.)

02:26 8 THE COURT: I'm ready for you, but let me just go ahead
02:26 9 and read into the record, with regard to the following claim
02:26 10 terms, building, including a plurality of facilities therein,
02:26 11 shopping mall and identifier including at least three fields
02:26 12 and address portion and output via the at least one mobile
02:26 13 device\causing to be output via the at least one mobile
02:27 14 device\caused to be output via at the least one mobile device,
02:27 15 these will all be plain and ordinary meaning as the proper
02:27 16 construction if there's no disclaimer and no lexicography. So
02:27 17 I just wanted to get that on the record. That's consistent
02:27 18 with what we're already saying. And if you can go ahead and do
02:27 19 a rebuttal argument to what counsel just said.

02:27 20 MR. DAHLGREN: Yes, Your Honor. Thank you.

02:27 21 So in the third grouping of claims and representative term
02:27 22 28, what we have is a system that's configured such that
02:27 23 subsequent output of different visual information is capable of
02:27 24 being caused without additional user input after the user
02:27 25 input. Dr. Goldberg conceded that messages connote structure

1 during his deposition, cited in our briefing. You know, user
2 input, visual information, additional user input types of
3 messages that are received amongst the various components here.
4 So we -- we do think it's a structure in the claim of the
5 threshold matter. And also the fact that, you know, output,
6 you know, via the at least one mobile device -- caused to be
7 output via the at least one mobile device that Your Honor gave
8 those are plain and ordinary meaning. I also think militates
9 in favor of finding this does not qualify as a means plus
10 function term because it would be readily understood that the
11 function that's being performed here is of the type that courts
12 have found to be simplistic enough that no detailed algorithm
13 was necessary. And I say that not even in context of the spec
14 but also just in the claim itself. The claims don't have to
15 recite, you know, structure precisely. There's a very long
16 line of case law noting that you can describe classes of
17 structure and things of that nature. And I think here for
18 outputting that that would be sufficient.

19 With respect to counsel's statements about, you know,
20 Figure 12, we did fault them in our briefing for not looking,
21 you know, to the descriptions. You know, one that, you know,
22 they're exemplary and non limiting but also that you have on
23 the provisional on Page 24. It's actually 16 of 35 of the
24 docket number. And this is Exhibit A to their opening brief.
25 You know, in Step 10 it talks about various actions that can be

02:29 1 taken at the mobile terminal singly or collectively in any
02:30 2 order and, you know, displaying certain elements of the message
02:30 3 content in the form of text, images or videos. Here what we
02:30 4 have is outputting different visual information where it's
02:30 5 supposed to be incapable and being configured to do that. I
02:30 6 think that, you know, what's even in the provisional, not even
02:30 7 going into the patents but provides support for that alleged
02:30 8 functionality. And I would, you know, take issue with the, you
02:30 9 know, functionality being defined the way it is.

02:30 10 I think again that the way that defendant has defined the
02:30 11 functionality in these claims encompasses a lot of what
02:30 12 actually kind of breathes life into the claims and gives
02:30 13 meaning. It's the, you know, context that was discussed in the
02:30 14 Zeroclick case. It was the objectives in the way of achieving
02:30 15 it that was discussed in, you know, other lines of cases. And
02:31 16 so I think that, you know, what we have here is a situation
02:31 17 that really stems on all fours with controlling Federal Circuit
02:31 18 law that there really is enough here.

02:31 19 And I would just go to the briefing here -- or not
02:31 20 briefing -- excuse me -- our slide deck, and starting at Slide
02:31 21 47, kind of going to legal standards. But essentially, you
02:31 22 know, we have the Zeroclick case where, you know, they faulted
02:31 23 the party for taking the claim term out of context. That was
02:31 24 one of the three issues they took with the case.

02:31 25 But then you go down to, you know, the Apex decision, and

02:31 1 really again it was relying on words in isolation as opposed to
02:31 2 the limitation as a whole.

02:31 3 And if you go to the next slide, I think the case law is
02:32 4 even more on point. And defendant faulted us for relying on
02:32 5 some pre Lighting World -- or Williamson cases that maybe
02:32 6 involved Lighting World. The Linear Tech case, as best I could
02:32 7 tell in 2004, it did not make any reference to the strong
02:32 8 presumption. And here what you have is a court noting that use
02:32 9 of the term "circuit" in the asserted claims in addition to
02:32 10 these other qualifiers, you know, was sufficient. It coupled
02:32 11 the description with the operation, and that provided
02:32 12 sufficient structural meaning to a person of skill in the art.
02:32 13 And given Dr. Goldberg's admissions regarding the system claims
02:32 14 and his failure to consider all the other structural elements
02:32 15 recited in there, you know, I think that that's, you know, a
02:32 16 failure of proof even under the preponderance standard. And
02:32 17 certainly I don't think he made that showing under clear and
02:33 18 convincing standard.

02:33 19 And then, you know, you have the Apple case, and I will
02:33 20 admit that this case did make one reference, I think, or two
02:33 21 references to the strong presumption, so I don't want to
02:33 22 mislead the Court in any regard there. But I still think that
02:33 23 analysis would hold up under either standard.

02:33 24 There it was a heuristic, but the operation was disclosed
02:33 25 in the context of the invention, you know, input, output and

02:33 1 how certain outputs are achieved, and it recited the objectives
02:33 2 of the claim. And, you know, then you have the Aloft Media
02:33 3 case, and, you know, again that's going back to relying on
02:33 4 Linear Tech. But, you know, it's talking about computer code,
02:33 5 and, you know, it's a component, but if you describe its
02:33 6 operation with a wherein clause, then that gives it sufficient
02:33 7 structural meaning implicitly, impliedly. And here the wherein
02:33 8 clause is the system, and this system includes all the
02:33 9 structural components.

02:33 10 And what we're talking about in this particular claim is
02:34 11 the output, and if you look at Claim 11, there's a very long,
02:34 12 lengthy description about, you know, what's going on here in
02:34 13 terms of, you know, what the application is doing. And part of
02:34 14 what the application is doing in part is, you know, causing the
02:34 15 output of different information, and it does so in a very
02:34 16 specific manner that I think again is in line with these -- you
02:34 17 know, these cases that I just put, you know, before you that it
02:34 18 should take it out of any risk of it being with an ambit of
02:34 19 112-6. I think that there's just really no basis for doing
02:34 20 that.

02:34 21 And I understand that we did make the argument initially
02:34 22 about the wherein clause, and, you know, I think that still
02:35 23 holds because our understanding of their argument essentially
02:35 24 was that you're just adding this functionality in the wherein
02:35 25 clause where there's just no structure tied to it, and that's

02:35 1 simply not true. What they didn't account for was that, you
02:35 2 know, it referred to the system, but, you know, taking them at
02:35 3 their words, that wouldn't be a 112 Paragraph 6 because 112
02:35 4 Paragraph 6 is meant to allow a patentee to recite a structural
02:35 5 element functionally. So it was based on the way we understood
02:35 6 their argument was how we were, you know, taking that approach.

02:35 7 But certainly a wherein clause can recite additional
02:35 8 functionality for a component that's previously recited in the
02:35 9 claim. And here we think that that, you know, again is
02:35 10 supported in the language of the claim itself and, you know, at
02:35 11 least the portion of the provisional application as they
02:35 12 continue to harp on that I identified.

02:36 13 If there's no further questions, that's all I have on that
02:36 14 term.

02:36 15 THE COURT: Okay. Thank you.

02:36 16 With respect to group 3, terms 16, 17, 21, 28 and 29 and
02:38 17 group 4, terms 23, 24 and 25, the Court finds that the terms in
02:38 18 group 3 and 4 or C and D, either one, recite functions and thus
02:38 19 are governed by Section 112 Paragraph 6. The Court also finds
02:38 20 the claims and specification do not recite sufficient
02:38 21 structure, therefore, the Court finds that the terms are
02:38 22 indefinite for lack of structure.

02:38 23 My understanding is that resolves all the terms that we
02:38 24 were going to fuss over today?

02:38 25 MR. TYSON: Yes, Your Honor.

02:38 1 THE COURT: Very good. I would hope that you --

02:38 2 (Conference between the Court and Mr. Yi.)

02:38 3 THE COURT: The trial is set for October 22nd of 2020.

02:38 4 Hard to say 2020. I'm trying to get used to that. I certainly

02:38 5 hope you guys have a wonderful -- is there anything else we

02:38 6 need to take up?

02:39 7 I hope you have a wonderful Christmas or whatever it is

02:39 8 you celebrate. I hope you give my good friend Mr. Devlin my

02:39 9 very best. I probably haven't seen him since -- I don't think

02:39 10 I've seen him since either he or I left Fish. So it's probably

02:39 11 been ten years, but he's certainly a wonderful lawyer.

02:39 12 MR. DAHLGREN: I'll make sure to pass that along.

02:39 13 THE COURT: I hope he's doing well.

02:39 14 So I appreciate everyone being here. I think that's all

02:39 15 that we have. I look forward to seeing you -- I look -- I

02:39 16 hope -- like unusually, I think, for most judges, I hope that

02:39 17 the case goes to trial. I like good lawyers. I like patent

02:39 18 trials. And so if you don't settle, I will see you, if not

02:39 19 sooner than -- between now and then, next -- I'll see you, I

02:39 20 guess, counsel next October or sooner.

02:39 21 (Hearing adjourned at 2:39 p.m.)

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1 UNITED STATES DISTRICT COURT)

2 WESTERN DISTRICT OF TEXAS)

3
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